Supreme Court, U.S.
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No. 00-792

IN THE

Supreme Court of the United States

ANTONIA J.H. ELKINS,

Petitioner,

v.

PHARMACY CORPORATION OF AMERICA, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Does the decision by the Court of Appeals denying the Petitioner's claim of sexual harassment on the basis that a single suggestion to go to a Hooters Restaurant could not support a finding of a hostile work environment conflict with relevant decisions of the Supreme Court?

II. Does the Court of Appeals' conclusion that appellants' claims "amount to nothing more than a nonactionable trivial discomfort endemic to employment" or are not supported by the evidence merit further review by the Supreme Court?

STATEMENT PURSUANT TO RULE 29.6

Pharmacy Corporation of America, Inc. ("PCA"), the respondent, at the time of the filing of the Complaint was a wholly owned subsidiary of Beverly Enterprises, Inc., a publicly owned corporation. Subsequent to the events alleged in the complaint, PCA merged with Capstone Pharmacy Services, Inc. and the surviving entity was named Pharmerica, Inc. Pharmerica, Inc. is a wholly owned subsidiary of Bergen Brunswig Corporation, a publicly owned corporation.

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COUNTER-STATEMENT OF THE CASE

A. Procedural Background

The Petitioner, Antonia J.H. Elkins ("Elkins") filed this case on August 19, 1998 in the United States District Court for the District of Maryland, Northern Division against the Respondents, Pharmacy Corporation of America ("PCA"), now known as Pharmerica, Inc. and G. Keith Anderson. ("Anderson"). The complaint contains four counts, including a Title VII claim based on sexual harassment, sex discrimination and retaliation. The other claims were for breach of contract, abusive discharge, and tortious interference with contract. All of Elkins' claims arose out of her employment by PCA as an IV-Nurse. The essence of Elkins' complaint was that Anderson, her supervisor, in the presence of another employee, suggested that the three of them eat dinner at a Hooters Restaurant in Richmond, Virginia where they were on company business. Elkins rejected the suggestion, and claimed that thereafter Anderson retaliated against her on the basis of that rejection, and that ultimately she was forced to resign her position. At the conclusion of discovery, the District Court granted PCA's and Anderson's motion for summary judgment as to all counts. See Appendix B to Petition for Writ of Certiorari. The Fourth Circuit Court of Appeals affirmed the District Court's ruling and denied Elkins' petition for rehearing and rehearing en banc. See Appendices C and D to Petition for Writ of Certiorari.

B. Facts

Elkins was hired by PCA as an IV-Nurse Consultant on or about July 8, 1996 and voluntarily resigned on October

18, 1996. Elkins had responded to PCA's advertisement seeking candidates for the position. During her employment, Elkins was assigned to the PCA pharmacy located in Beltsville, Maryland (the "Beltsville Facility"), and Elkins' immediate supervisor was Anderson, the Beltsville Facility pharmacy manager.

At the time of her employment with PCA, Elkins was provided with an Employee Handbook that set forth all of PCA's applicable employee rules, regulations and policies, including but not limited to PCA's sexual harassment policy. Elkins' employee file contained an acknowledgment that she had received a copy of the Employee Handbook. The Employee Handbook also explicitly advised all employees that they were at-will employees and that only the President of PCA could enter into an employment contract with an employee on behalf of PCA.

At all times Elkins was an at-will employee, who did not have any employment contract with PCA. At all times Elkins was treated as an exempt employee for purposes of the wage and hour laws. Accordingly, Elkins was paid by salary; she did not receive overtime pay, nor was she required to work a set period of time to be entitled to her salary, provided that she accomplished her job duties. At no time while Elkins was employed by PCA was her compensation reduced or in any way modified because she worked less than forty (40) hours in a workweek.

Elkins, like several other exempt employees at the Beltsville Facility, was permitted to work from her home, subject to certain terms and conditions. PCA exempt employees at the Beltsville Facility who were permitted to work outside of the Beltsville Facility on job-related matters

were expected to be available to the Beltsville Facility management by the company-provided beeper between 8:00 a.m. and 5:00 p.m., Monday through Friday, and at such other times as may be required to provide the necessary services to PCA's clients, and to be present for meetings and conferences at the Beltsville Facility as required.

Elkins' position as an IV-Nurse required her to travel to PCA facilities in Maryland, Virginia, West Virginia and the District of Columbia. Again, Elkins like all other exempt employees at the Beltsville Facility, was compensated for her travel expenses at the rate of $0.31 per mile less the distance from her home to the Beltsville Facility.

On August 5, 1996, Elkins, Anderson and Susan Stevens ("Stevens") were in Richmond, Virginia for company business. While waiting for Elkins to arrive at their hotel in Richmond, Anderson mentioned to Stevens that he liked chicken wings and wondered if there was a Hooters restaurant in Richmond since they were well known for their chicken wings. Stevens was not offended by the suggestion and stated that she would go to the front desk and ask if there was a Hooters in Richmond. Elkins encountered Stevens in the hotel lobby, where Stevens told Elkins about Anderson's suggestion to go to Hooters. Elkins told Stevens that she was not going to eat at a restaurant called Hooters. Elkins claims that she later confronted Anderson and repeated what she had told Stevens. The three eventually ate at a Lone Star Steakhouse. Other than Stevens and Anderson, prior to her resignation, Elkins never discussed the suggestion to dine at Hooters with any other employees, any other member of the PCA management team, or anyone in the PCA Human Resources Department.

On August 27, 1996, Anderson called Elkins at home and insisted that she meet with him in the Beltsville Facility on short notice. During his meeting with Elkins, Anderson's attention was diverted on more than one occasion to deal with other matters, both work related and non-work related; on September 18, 1996, while Elkins was at the Beltsville Facility to conduct some training, Anderson told her for the first time that there was a 7:00 p.m. meeting that evening; Anderson also asked Elkins if she had a "babysitting problem"; on October 1, 1996, Elkins appeared at the Beltsville Facility for a scheduled meeting, after she arrived she was told that the meeting was planned for a different location, but that it had been cancelled.

On October 7, 1996, Elkins was to receive her 90-day evaluation. On her way to the meeting, Elkins was called by Anderson and told that he would be late for the meeting because of a previously scheduled conference. After waiting for forty-five minutes, Elkins was told by Anderson that the meeting needed to be rescheduled. Subsequently on October 15, 1996, Elkins received an above-average performance evaluation.

On October 11, 1996, a director of nursing at a nursing home asked Elkins about starting quarterly enteral quality assurance. Elkins believed, and rightly so, that enteral quality assurance was not related to IV therapy, not within the scope of her job description and would be a full time job in itself. In addition, Elkins (erroneously) believed that Anderson told the particular director of nursing that Elkins was going to conduct the quarterly enteral quality assurance, without telling Elkins and while knowing that she could not accomplish it along with her regular job duties, in an effort to make Elkins look bad. Elkins, however, was never required

by Anderson or anyone else at PCA to conduct any enteral quality assurance, which was ultimately performed by PCA staff from Massachusetts.

On October 17, 1996, Elkins attended a meeting with twenty directors of nursing. During a presentation being given by Elkins, Carl Prince, a nurse consultant, stood up and said that he wanted only three-day training courses, as opposed to two-day courses, and that he had already expressed this desire to PCA. Elkins then fielded inquiries about this topic for the next hour and a half. Elkins believed that Anderson intentionally refrained from telling her about Mr. Prince's desire for three-day courses so that Elkins would embarrass herself at the meeting.

On October 17, 1996, Anderson left a message for Elkins that he wanted her to come into the office the next day to discuss some things. On October 18, 1996, Elkins called Anderson to discuss the issues. Anderson told Elkins that he wanted to see her in person. Elkins responded that if she reported to the office, she would not have time to prepare to teach classes the next week. Elkins claims that Anderson asked her if she was having trouble with babysitting. Elkins claims that Anderson told her that he could change the terms of her hire at any time, that he did not consider drive time to be work time, and that he expected Elkins to be available to come into the office Monday to Friday between 8:00 a.m. and 5:00 p.m.

On October 18, 1996, Elkins resigned from her employment with PCA by faxing a letter of resignation to Anderson after the close of business. Prior to submitting her letter of resignation on October 18, 1996, Elkins never followed PCA's outlined procedures with regard to filing a

complaint of sexual harassment by a fellow employee. Upon receipt of her letter of resignation, PCA immediately conducted a thorough investigation of the allegations and concluded that they were unfounded. A letter advising Elkins of the outcome of the investigation was mailed to her on October 22, 1996.

C. Sup. Ct. Rule 15.2 Petitioner's Misstatements of Law and Facts

The Petition is replete with misleading representations of the facts in the record, which prevents this Court from assessing the propriety of the decisions of the lower courts.

Throughout her Petition, Elkins claims that her ability to work from home close to her children was important to her and a consideration that she alleges was altered by Anderson. For example, in the opening of her Questions Presented for Review, the Petitioner states: "She accepted employment with the corporate Respondent upon terms, carefully negotiated by her and acknowledged by the company, **which would allow her to perform her job without interfering with her ability to devote time to her young children.**" Petition for Writ of Certiorari, p. i (emphasis added) (hereafter "Pet. For Cert.") The record indicates that Elkins was aware of the travel required in the job from the very beginning. The letter by which she was offered employment specifically states: "I cannot overemphasize the importance of your position and the need for your presence on a regular basis in the homes we service. As discussed, this will incur a significant amount of travel and field work." Pet. for Cert., App. 2j.

Elkins' next misleading statement concerns her alleged complaints of the Hooters incident. She states in her Petition that she "refused the invitation [to Hooters] and vigorously complained to her supervisor (Anderson himself, initially, and later to the corporate human resources director) . . ." Pet. for Cert., p. 6. In fact, aside from her initial refusal of the invitation, Elkins never again complained to Anderson and did not mention the incident to the human resources department until after her resignation more than three months later.

Elkins again misstates the facts when she claims that she "was entitled to suspect that the oversights [on the part of Anderson not to inform her of changes in meeting times and places] were deliberate in view of the fact others were given the information they needed." Pet. for Cert., p. 12. Nothing in the record supports this statement. The record does, however, include the deposition of another PCA employee, Ms. Stevens, who testified that Anderson forgot to tell her that meetings had been cancelled.

Another blatant example of a factual misstatement can be found in the Petitioner's attempt to show that she was singled out for mistreatment. She states: "Interviews of long-term employees (similarly situated males except for one female, Ms. Stevens, who had not complained about the invitation to Hooter's) established that Anderson rarely if ever forgot to give them information; none could recall a specific incident." Pet. for Cert., p. 15. This statement is curious because the Respondent is aware of no interviews other than Ms. Stevens and Janice Rutowski, who worked in the corporate human resources department and did not have daily contact with Mr. Anderson. Nor is there anything in the record to support Elkins' claim that she "consulted with

other employees, and found out that she had been singled out for this treatment [not to count drive time as work time]." Pet. for Cert., p. 16.

Finally, in an attempt to provide the Court with the requisite "ultimate employment action" taken against her, Elkins draws an inappropriate conclusion from a misleading statement of the facts. After her resignation, Elkins went to a seminar that had been scheduled prior to her resignation — for the admirable reason to fulfill her commitment to her customer. Mr. Anderson, however, did not arrange for the necessary materials to be sent for the seminar because he did not want, nor expect, Elkins, who was no longer employed by PCA, to present a seminar on its behalf. The Petitioner asserts this reasonable action by Anderson implies that he intended to fire her. "Anderson indicated, when contacted by phone, that he did not want her to do any more work for the company — **thus, he revealed that it had been his intention to terminate her employment, establishing that an ultimate employment action had occurred.**" Pet. For Cert., p. 21 (emphasis added). This unreasonable, far-reaching inference is typical of the Petitioner's view of all of the events that occurred during her employment with PCA.[1]

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1. In the Petioner's Appendix, she has included many documents that were not part of the record below and which have little or no probative value to the issues in this case. While Sup. Ct. R. 14.1(i)(vi) permits a petitioner to include any material that it believes essential to understand the petition, such material should at least have some probative value and be otherwise the kind of information or documentation that would be admissable at a trial. Because the documentation included by the Petitioner in Appendices G, H and I do not meet such standard, they should be disregarded by the Court in its consideration of the Petition.

REASONS FOR DENYING THE WRIT

The record in this case supports the Fourth Circuit Court of Appeals' holding that Elkins could establish no valid claim for sexual harassment. The applicable law is clear that a single incident, like the suggestion to dine at Hooters, cannot meet the requirement that the alleged conduct be sufficiently severe or pervasive to alter an employee's conditions of employment such as to create a hostile work environment. In affirming summary judgment for PCA, the court of appeals properly performed its function by concluding as a matter of law that based upon the facts of this case, no reasonable jury could find that Elkins' claim constituted a hostile work environment.

Second, the court of appeals properly concluded that no adverse employment action was taken against Elkins. None of the acts complained of by Elkins constitutes the kind of ultimate employment decisions that would have had an immediate effect on Elkins' employment relationship with PCA, an essential element of any retaliation claim. In addition, the record is devoid of any evidence that any of the actions allegedly taken by Anderson against Elkins were the result of her rejection of his suggestion to go to Hooters or any evidence that Elkins was treated any differently than other consultants under Anderson's supervision.

The decision of the Fourth Circuit Court of Appeals that the Petitioner seeks this Court to review is not in conflict with any other court of appeals on the issues presented. Nor does the court of appeals decision depart from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Indeed, the Petition makes no such claim. Moreover, there has been no ruling in this case deciding an important question of federal law that has not been, or should

be, settled by this Court. The Petitioner seeks this Court to review and reverse the decision of the court of appeals that the facts alleged cannot support a Title VII violation of any kind.[2] Not only are the decisions of the lower courts correct and well-reasoned, there is no issue in this case that justifies the extraordinary step of this Court exercising its power to review.

I. There was No Hostile Work Environment

The court of appeals properly held that there was no valid claim for sexual harassment based upon a hostile work environment theory. The single incident of which Elkins complained cannot support a finding of a hostile work environment.

> To prove a hostile work environment claim under Title VII, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.

Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc).

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2. The Petition references, as a sidelight, the dismissal of the Petitoner's state law claims. Clearly, none of those claims involve questions of federal law that require review from this Court. Nor does the dismissal of those claims depart from accepted and usual judicial proceedings so as to call for this Court's review.

In order to state a prima facie case of hostile work environment sexual harassment, a plaintiff must set forth conduct by the defendant, that "was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment." *Spicer v. Commonwealth of Virginia Dep't of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

The court of appeals held that the single suggestion of going to Hooters could not support a finding of a hostile work environment because the alleged harassment amounted to a single remark that was neither severe nor threatening and did not interfere with Elkins' work performance. Elkins continues to argue in this Court, that her hostile work environment claim is not limited to the single suggestion to dine at Hooters, but also included other alleged events. These events, however, relate to the retaliatory actions allegedly taken by Anderson after Elkins rejected his suggestion. For example, Elkins' allegation that Anderson failed to advise her about the cancellation of a meeting cannot be the basis of a sexual harassment claim, nor could his insistence that she appear in his office on certain occasions for work-related activity. These remaining allegations of wrongdoing form Elkins' assertion that she suffered a tangible change in employment status. None of these allegations constitute any evidence of an incident of sexual harassment.[3]

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3. Petitoner claims her petition should be granted because it raises a novel issue, whether alleged retaliation can be used as a basis for proof of her claim of sexual harassment. However, there is

(Cont'd)

When evaluating the conduct in the instant case to make a determination of whether or not it was severe or pervasive enough to fit within Title VII, the Court must examine the totality of the circumstances, including 1) the frequency of the discriminatory conduct; 2) its severity; 3) whether it is physically threatening or humiliating, or a mere offensive uttering; and 4) whether it unreasonably interferes with an employee's work performance. *Hopkins v. Baltimore Gas & Electric Company*, 77 F.3d 745, 753 (4th Cir. 1996).

Applying these factors to Elkins' claim, the only allegation of discriminatory conduct is the one alleged incident involving an invitation to dine at Hooters Restaurant. The invitation did not even come from Anderson directly. Anderson suggested that he, another female co-worker and the plaintiff have dinner at Hooters Restaurant. When the other female co-worker passed on the suggestion to Elkins, outside of the presence of Anderson, Elkins declined. The dinner invitation was in no way physically threatening or humiliating. At worst, it was in poor taste, although the other female co-worker did not think so. Anderson did not make any suggestive remarks to either Elkins or the other co-worker during the time of the alleged incident. Finally, the alleged conduct occurred while three co-workers were meeting to eat together while travelling on company business. The alleged conduct caused no interference with Elkins' work performance.

(Cont'd)
nothing novel about the issue. In establishing whether or not sexual harassment exists, courts are not permitted to consided non-sexual or non-gendered related comments or acts. *See Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257 (10th Cir. 1998); *Gupta v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000).

The court of appeals simply and correctly performed its function under Rule 56 by holding that as a matter of law, Elkins' claims did not constitute sexual harassment. In doing so the court properly found that no reasonable jury could find that Elkins' claims were sufficient to support a claim of a hostile work environment. That decision is consistent with its decision in *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766 (4th Cir. 1997).

> But the claims propounded by Hartsell — even assuming them all to be true — are so trivial, so isolated, and so far from the paradigmatic case of sexual harassment, that summary judgment was clearly appropriate. Hartsell has produced evidence that the salespeople at Duplex — one of whom was female — were at times difficult to work with, insensitive, immature, and even insulting. Even assuming the truth of this evidence, and viewing the inferences therefrom in the light most favorable to Hartsell, she is not entitled to try her case. n6
>
> n6 Hartsell's theory would preclude the entry of summary judgment in any sexual harassment case. Here there are no questions of fact – we reject her claim despite our assumption that her allegations are true.

Id. at 773. As the court noted in *Hartsell*, under Elkins' theory, summary judgment would not be appropriate in any sexual harassment case. The lower courts properly rejected her claim despite assuming her allegations were true.

The Petitioner questions whether the court of appeals decided this case in contradiction to its own previous holding in *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994). The obvious answer is NO. In the instant case, the court determined that no reasonable factfinder could find that the conduct of which the Petitioner complained was sufficiently severe and pervasive to make out a sexual harassment claim. The fact that the court of appeals in *Beardsley* approved the district court's decision that submitted to the jury the question of the sufficiency of the severity and pervasiveness of the conduct alleged does not mean that its decision in this case contravenes *Beardsley*. The alleged misconduct in *Beardsley* was far worse that the allegations in this case. Those allegations included persistent name calling, shoulder rubbing in front of the plaintiff's husband, questions about her underwear and unjustified accusations of an affair with a co-worker. *Id.* at 528.

The conduct alleged by Elkins in the instant case is simply not severe enough so that a reasonable person would find the environment to be hostile or abusive. *See Harris*, *supra*. While Elkins may have been offended by Anderson's choice of restaurant, co-workers may not always be sensitive to other's perceptions. "Title VII is not a guarantee of refinement and sophistication in the workplace, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive." *Hartsell*, at 773.

Not only is the decision by the court of appeals correct, it is consistent with the rulings of other circuit courts and not in conflict with any other circuit court opinions. Indeed, there are many cases where the alleged conduct was far more repeated, severe and personal, and still, the courts found that

no claim for sexual harassment existed. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238,1246 (11th Cir. 1999); *Shepherd v. Comptroller of Public Accounts of Texas*, 168 F.3d 871, 872-875 (5th Cir. 1999); *Quinn v. Green Tree Credit Corp.*, 159 F. 759, 768 (2d Cir. 1998); *Adusumilli v. City of Chicago*, 164 F.3d 353, 357 (7th Cir. 1998); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24 (6th Cir. 1997).

Finally, the decision of the court of appeals is clearly consistent with the decisions of this Court. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), this Court held that:

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discrimination* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Id. at 81. The single invitation to dine at Hooters by Anderson did not constitute such discrimination, and accordingly, the petition should be denied.

II. There was No Ultimate Employment Decision

The Petitioner seeks review based on her allegation that the lower courts failed to find that the Respondents refusal to count drive time as work time was an ultimate employment decision. Again, this claim is not a basis for this Court to review this case. More importantly, the lower courts were absolutely correct in so holding.

In order to state a claim for retaliation, Elkins had to establish that 1) she engaged in protected activity; 2) her employer took adverse employment action against her; and 3) a sufficient causal connection existed between her protected activity and her employer's adverse employment action. *Hopkins v. Baltimore Gas & Electric Company*, 77 F.3d 745, 753 (4th Cir. 1996); *see also McNairn v. Sullivan*, 929 F.2d 974 (4th Cir. 1991). Elkins failed to prove the second and third elements of the claim.

Adverse employment action has been defined as "ultimate employment decision" as opposed to "interlocutory or mediate decisions having no effect upon employment conditions." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981); *see also Ward v. Johns Hopkins University*, 861 F. Supp. 367 (D.Md. 1994) and *Raley v. Bd. of St. Mary's County Comm'rs*, 752 F. Supp. 1272 (D.Md. 1990). There was no adverse employment action — or ultimate employment decision — taken against Elkins.

The Petitioner cannot dispute that she was an exempt salaried employee. As such, she was treated just as other similarly classified employees were. She received her salary without regard to the number of hours-above or below

forty-worked in a week. Furthermore, Elkins' allegation concerning drive time, as work time is particularly peculiar for it was made clear to her at the time of her hire that she was to "incur a significant amount of travel and field work." Pet. for Cert., App. 2j.

Likewise, Elkins' position that drive time had to be considered work time in order for her to be able to complete the required 40-50 hours of work per week has no merit. Elkins says that it is not an issue of compensation but one of how her work time was spent. Again, Elkins fails to see the lack of merit in her position. As an exempt salaried employee she received the same amount of compensation whether it took her 20 or 60 hours per week to perform her job duties. She now tries to complain that without counting drive time it would take her an enormous number of hours to perform her job duties. The reality is simple — Elkins knew at the time of her hire that there was a significant amount of travel and fieldwork required of her position. With that knowledge she accepted the position and performed her duties for over three months. It doesn't matter whether her drive time was considered work time or not, because either way she still had to perform her job duties. There is no allegation that Anderson or anyone else at PCA increased Elkins' responsibilities such that it was any more difficult than it had been for her to perform her functions as an IV-Nurse. Even if Anderson did tell Elkins that drive time was not included in work time, it cannot amount to a tangible change in employment status because of her treatment as an exempt employee. Indeed, the burden is on the Petitioner to show that the Respondents compensated her differently after the alleged declaration not to count travel time as work time. The Petitioner has no such evidence to produce to satisfy that burden.

The Petitioner suggests that the court of appeals narrowly interpreted its decision in *Page v. Bolger*, and thus merits review by this Court. The mere fact that the Court suggested that there were many kinds of events that may give rise to an "ultimate employment decision", does not alter the fact that such events must have a significant adverse effect on the employee. None of the complaints raised by Elkins meets that standard. Indeed the Petitioner can point to no case where a court has held such alleged acts to have given rise to a claim for retaliation. All that the Petitioner has said repeatedly in the district court, in the court of appeals and again in this Court, is that I believed I was hurt by Anderson's actions and therefore retaliation existed. That is not enough to support the burden that Elkins had in this case. There is no grounds for this Court to grant the writ as it relates to this claim.

III. The Petitioner Cannot Raise New Issues in This Court Now.

For the first time in her Petition, Elkins questions whether or not PCA met its duty to protect Ms. Elkins from sexual harassment or did it assist in her termination. This issue was never raised before the court of appeals and therefore does not present a proper consideration for this court.

Notwithstanding her tardiness in raising the issue, it requires a brief response. PCA had a procedure in place to be followed in the event an employee wished to lodge a complaint. Elkins never followed the PCA procedures to complain about Anderson's conduct. In fact, PCA did not become aware of Petitioner's allegation of sexual harassment until after she resigned from her employment. At that time,

PCA investigated the allegations and made the appropriate conclusion that no harassment or discrimination occurred. It can hardly be said that PCA assisted in her termination.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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